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In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424-0001
(202) 482-6620

**Counsel of Record*

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Cases—Continued

IRS v. *FLRA*, 717 F.2d 1174 (7th Cir. 1983) 9

NAGE, Local R14-87 and Dep't of the Army, Kansas Army National Guard, Topeka, Kansas, 21 FLRA 380 (1986) 15

National Treasury Employees Union v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) 2

National Treasury Employees Union v. *FLRA*, 826 F.2d 114 (D.C. Cir. 1987) 12

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NTEU and Internal Revenue Serv., 27 FLRA 132 (1987) 15

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Ratzlaf v. *United States*, 510 U.S. 135 (1994) 11

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U.S. Dep't of Health and Human Services, Social Security Admin., 44 FLRA 230 (1992) 6

U.S. Dep't of Transportation, Federal Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Kentucky, 53 FLRA 312 (1997) ... 5

U.S. International Trade Commission, Washington, D.C. and Local 2211, American Federation of Government Employees, AFL-CIO, 98 FSIP 18 (Apr. 7, 1998) 20

Veterans Admin. Med. Ctr., Tampa, Florida v. *FLRA*, 675 F.2d 260 (11th Cir. 1982) 20

Statutes:

Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) 1

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Miscellaneous:

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F. Ferris, *Union-Initiated Mid-Term Bargaining; A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407 (Oct. 1989) 16
Websters Third New International Dictionary 445 (1986) 7
2A *Sutherland, Statutory Construction*, 47.07 (5th ed. 1992) 5

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REPLY BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

I. The Statute Obligates Agencies to Bargain over Union-Initiated Midterm Proposals

The Federal Labor Relations Authority (Authority) properly held that under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7101-

7135 (1994 & Supp. II 1996), federal agency-employers are obligated to bargain during the term of an existing collective bargaining agreement over union-initiated proposals. The Authority's position is entirely consistent with the language of the Statute, and is, in any event, entitled to deference. Further, the policy-based arguments advanced by Respondent are without merit and premised on unsupported factual assumptions.

A. The Language and Structure of the Statute Support the Authority's Position

Respondent contends (Br. 12) that Congress spoke directly to the issue of midterm bargaining, and that the text and structure of the Statute manifest a "deliberate congressional choice" to exclude mid-term bargaining from an agency-employer's obligation to bargain. However, not even the Fourth Circuit concluded that Congress directly excluded midterm bargaining, instead stating that "the textual analysis [of the Statute] is not definitive in this case, for the [Statute] does not explicitly discuss union-initiated midterm bargaining." *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992) (*SSA* v. *FLRA*); *see also National Treasury Employees Union* v. *FLRA*, 810 F.2d 295, 298 (D.C. Cir. 1987) (text of the Statute "neither specifies nor distinguishes midterm bargaining, union-initiated bargaining, and any other type of bargaining"). Contrary to the Respondent's contention, the text and structure of the Statute support the Authority's position.

1. Section 7114 Establishes a Broad Obligation to Bargain That Reasonably Includes Midterm Bargaining

Not disputing that under the National Labor Relations Act (NLRA) private sector employers are obligated to bargain over union-initiated midterm proposals, Respondent contends (Br.13) that certain differences between the wording of the NLRA and the Statute are "dispositive" of the issue in this case. Specifically, Respondent argues (*id.*) that although the NLRA imposes on private sector employers a "sweeping duty 'to bargain collectively,'" section 7114(a)(4) of the Statute requires federal agency employers to "negotiate in good faith for the purposes of *arriving at a collective bargaining agreement.*" (Emphasis in Respondent's brief).

However, Respondent's distinction between bargaining "collectively" and bargaining "for the purposes of arriving at a collective bargaining agreement" is one without a difference. Respondent's argument rests on the mistaken premise that under the Statute "collective bargaining agreement" *means* a single agreement that "comprehensively defines the rights and obligations of the parties for a period of years." Br. 15. Such an overly restrictive definition of "collective bargaining agreement" is inconsistent with both the express statutory definition of the term and its ordinary usage.[1] Rather the phrase is properly

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[1]The Fourth Circuit did not rely on the definition of "collective bargaining agreement," but instead emphasized section 7114(a)(4)'s reference to "a" collective bargaining agreement. *SSA* v. *FLRA*, 956 F.2d at 1284. However, as the Authority demonstrated in its opening brief (pp. 21-22), the reference to "a" collective bargaining agreement is most reasonably interpreted as generic and indefinite with respect to number.

understood as referencing any agreement over conditions of employment. Accordingly, it is clear that the obligation to bargain under the Statute is likewise broad and is not limited to negotiating a single comprehensive term agreement.

a. The Statute Expressly Defines "Collective Bargaining Agreement" as Any Agreement Concerning Conditions of Employment

Section 7103(a) provides the definitions of terms used in the Statute. Section 7103(a)(8) states that "'collective bargaining agreement' means an agreement entered into as a result of collective bargaining pursuant to the provisions of [the Statute]." In turn, section 7103(a)(12) provides that "'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]"

Read together, these provisions define "collective bargaining agreement" as any agreement reached as a result of bargaining over conditions of employment. The definition contains no restrictions concerning the circumstances occasioning bargaining or the number of agreements into which the parties may enter. Hence, although the phrase "collective bargaining agreement" applies to a comprehensive term agreement, it equally applies to an agreement reached midterm over a single issue.

Respondent acknowledges (Br. 16-17 n.5) the definitional provisions of section 7103(a), but argues that

the definitional section "cannot be construed to expand section 7114(a)(4)'s limited duty to negotiate . . . for the purposes of arriving at a *collective bargaining agreement.*" (ellipses and emphasis in original). According to Respondent, by restricting section 7103(a)(8) to agreements reached "pursuant to the provisions of [the Statute]," the definition is limited to Respondent's view of the kind of agreement referred to in section 7114(a)(4), *i.e.*, a term agreement. *Id.*

Respondent's argument is, however, patently circular. Respondent first limits the reach of section 7114(a)(4) by imposing a more narrow definition of "collective bargaining agreement" than that expressed in the Statute. It then uses that interpretation of the substantive provision in an attempt to conform the statutory definition to its alternative definition. However, any such analysis must begin with section 7103(a), because that section sets out the express statutory definitions that establish the meaning of terms whenever those terms are used in the same statute. *See In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996); *see also* 2A *Sutherland, Statutory Construction*, 47.07 (5th ed. 1992). Where a statute provides a definition, no other definition may be substituted. *See Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979).

Further, Respondent's narrow construction is inconsistent with the manner in which the broad obligation to bargain has been interpreted by agencies, unions, and the Authority. For example, the provisions of section 7114 have been applied to agreements other than "comprehensive term agreements," including those resulting from management-initiated midterm changes. *See e.g., U.S. Dep't of Transportation, Federal Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317-19 (1997)

(midterm agreement involving only the design of facility subject to section 7114(b)(5)'s requirement to reduce agreement to writing). In addition, numerous cases have arisen where an agency head has exercised the right under section 7114(c) to review collective bargaining agreements other than term agreements. *See, e.g., NFFE, Local 642, et al. and U.S. Dep't of Interior, Bureau of Land Management, Oregon State Office*, 38 FLRA 503 (1990).[2] Accordingly, Respondent's argument is foiled by the fact that section 7114 in general and section 7114(a)(4) in particular have consistently been applied — by all parties without objection — to agreements other than a comprehensive term agreement.

b. The Ordinary Definition of Collective Bargaining Agreement Is Broad

Irrespective of the broad *statutory* definition of "collective bargaining agreement," Respondent asserts (Br. 17-18) that Congress used the term in section 7114(a)(4) "as that term has been used in labor law throughout this century: to denote a comprehensive term contract between an employer and a union."

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[2]Contrary to Respondent's suggestion (Br. 17), this broad definition is consistently applied in other statutory contexts as well. *See, e.g., NTEU* v. *FLRA*, 910 F.2d 964 (D.C. Cir. 1990) (in banc) (section 7118(a)(7)(B)'s remedial provision permitting the Authority to compel parties to renegotiate "collective bargaining agreements" applied to bargaining over employer-initiated office relocation). Similarly, Respondent's reference (Br. 17) to the "contract bar" provisions of section 7111(f)(3) is unavailing. As is clear from the context of the case cited by Respondent, the Authority defined "collective bargaining agreement" as one "containing substantial terms and conditions of employment" only within the limited scope of section 7111(f)(3). *See U.S. Dep't of Health and Human Servs., Social Security Admin.*, 44 FLRA 230, 239 (1992).

However, Respondent cites no authority which so limits the definition of "collective bargaining agreement."[3] Further, such a cramped definition defies common sense, for what could one possibly call any agreement reached between an employer and the union which represents its employees other than a "collective bargaining agreement"?[4]

2. Section 7106 Does Not Establish an Obligation to Bargain Midterm Independent from Section 7114(a)(4)

Respondent concedes (Br. 20) that the Statute obligates agencies to bargain midterm over procedures and arrangements for adversely affected employees (also known as "impact and implementation" or "I and I" bargaining) in response to the agencies' exercise of

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[3]*NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 519 (1984) (*Bildisco*), is the sole case cited by Respondent. Br. at 16 n.4. *Bildisco* concerned only the obligations of a debtor-in-possession in bankruptcy proceedings with respect to a collective bargaining agreement. 465 U.S. at 516. Although the collective bargaining agreement specifically at issue in that case may have been a "comprehensive term agreement," nothing in the case so limits the general scope of the term.

[4]As the Authority noted (Authority Br. at 30 n.13), in both the Statute (section 7103(a)(12) and the NLRA (section 8(d), 29 U.S.C. 158(d)), collective bargaining is defined as meeting and discussing conditions of employment, without reference to time or circumstance. Similarly, *Black's Law Dictionary* defines collective bargaining agreement broadly as an "agreement between an employer and a labor union which regulates terms and conditions of employment." *Black's Law Dictionary* 263 (6th ed. 1990). Further, Respondent's reference (Br. 16 n.4) to the similarly general definition in *Webster's Third New International Dictionary* does not yield a different result. Significantly, that same dictionary defines "collective bargaining" as "any union-management negotiation." *Webster's Third New International Dictionary* 445 (1986) (emphasis added).

rights reserved under section 7106 of the Statute. However, Respondent mistakenly contends that the source of that obligation is section 7106 rather than section 7114.[5] Building on that mistaken premise, Respondent argues (Br. 20) that "the inclusion of a specific duty of midterm effects bargaining . . . suggests the inadvisability of reading a more general duty [to bargain midterm] into the [S]tatute" (quoting from *SSA* v. *FLRA*, 956 F.2d at 1284). But, as discussed in the Authority's opening brief (pp. 22-23), all bargaining obligations, including the obligation to bargain "I and I," flow from section 7114.

Examination of the text of section 7106 makes it clear that that section, in and of itself, imposes no duty to bargain on an agency. Nowhere in section 7106 is there language that requires bargaining in any form. Indeed, section 7106(a), known as the "Management Rights" clause, is not expressly about bargaining. Rather, it is a sweeping exclusion from the strictures of the Statute, stating that "nothing in the [Statute] shall effect the authority of any management official of any agency" to take certain actions specified in the section. *See Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928-30 (1990). Subsections 7106(b)(2) and (b)(3) constitute provisos that clarify or modify the scope of section 7106(a). *See AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983). Thus, these subsections do not create a bargaining obligation, but rather remove "procedures" and "appropriate arrangements" from section 7106(a)'s exception to the broad bargaining obligation originating from and described in section 7114(a)(4).

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[5]Moreover, this contention is at odds with Respondent's concession (Br. 13) that an agency employer's obligation to bargain emanates from section 7114(a)(4).

Moreover, Respondent mistakenly contends (Br. 20) that section 7106 is specifically about *midterm* bargaining. Rather, to the extent section 7106 affects the scope of bargaining, *i.e.* the appropriate subjects of bargaining, it does so in all bargaining contexts. *See, e.g., Department of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) (*Department of Defense*) (application of section 7106(b)(2) in case arising out of term basic contract negotiations).

Respondent is also incorrect in asserting (Br. 20-21) that the Authority and the courts have "identified section 7106(b) as the source of an agency's obligation to bargain when it makes unilateral changes to the conditions of employment." The quotations from the cited cases are taken wholly out of context. For example, if one reads the entire paragraph from which Respondent extracts a single sentence in *IRS* v. *FLRA*, 717 F.2d 1174, 1176 (7th Cir. 1983), it is clear that the court finds the source of the agency's obligation in the Statute's "broad duty to bargain over conditions of employment."

3. Congress's Intent with Respect to Midterm Bargaining Cannot Be Ascertained from Absence of Express Restrictions on Midterm Bargaining

Respondent adopts the position of the Fourth Circuit that the natural explanation for Congress's omission in the Statute of an explicit restriction on midterm bargaining similar to that enacted as an amendment to section 8(d) of the NLRA is that such restriction is unnecessary because no right to midterm bargaining exists at all in the federal sector. However, as the Authority argued in its opening brief (p. 32), such an inference from congressional silence is unwarranted.

Contrary to Respondent's suggestion (Br. 19), the Authority did not "tr[y] to explain the omission by speculat[ing] that the absence of [the 8(d) restriction] signaled Congress's intent to permit unrestricted midterm bargaining." Rather, by positing (Authority Br. 32) that "one could equally speculate" that Congress intended unrestricted bargaining, the Authority was arguing that no specific congressional intent could be inferred solely from the lack of an explicit midterm bargaining restriction.[6]

4. Neither Prior Administrative Practice Nor the Statute's Legislative History Supports Respondent's Position

Respondent also argues that both the practice under the Executive Order which governed federal sector labor relations before the enactment of the Statute and the Statute's legislative history support the conclusion that Congress deliberately excluded an obligation to bargain midterm in the Statute. However, Respondent can draw support from neither source.

With respect to Executive Order practice, the Authority demonstrated in its opening brief that Executive Order precedent on the issue is inconclusive because the Federal Labor Relations Council, the body charged with administering and interpreting the Executive Order, never addressed the issue and, further, Executive Order practice is of limited value in interpreting the Statute. Respondent repeats, without

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[6]Moreover, as argued by petitioner National Federation of Federal Employees (Br. 23), an equally plausible explanation for the omission of a "covered by" restriction is that the doctrine was a well-established "fundamental labor law principle" at the time of the enactment of the Statute.

further analysis, the Fourth Circuit's erroneous finding of a presumption, in section 7135(b) of the Statute, to codify Executive Order practice. However, as noted in the Authority's Brief (pp. 27-28), the purpose of section 7135(b) was not to preserve Executive Order practice, but only to provide interim continuity and guidance until the Authority and the courts could interpret and apply the Statute.

With respect to the sparse legislative history on midterm bargaining, the Authority has previously demonstrated (Authority Br. 25) that the quote from the Senate Report is of limited value because it discussed a version of the legislation ultimately not enacted by the Congress. But even to the extent the Senate Report would be indicative of the view of some members of Congress, a single isolated statement in the Committee Report does not represent an authoritative interpretation of the relevant statutory language. *See NLRB* v. *Health Care & Retirement Corp. of Amer.*, 511 U.S. 571, 582 (1994); *see also Ratzlaf* v. *United States*, 510 U.S. 135, 147 (1994) (legislative history cannot cloud a statutory text that is clear); *see also Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 649-50 (1990) (*Fort Stewart Schools*).

B. Deference Is Owed to the Authority's Statutory Interpretation

As argued above and in the Authority's opening brief, the language and structure of the Statute demonstrate that Congress created a broad obligation to bargain over conditions of employment that includes bargaining during the term of an agreement over matters not contained in or covered by that agreement. Nonetheless, even to the extent one concludes that Congress did not directly and unambiguously establish

the obligation to bargain midterm, the Authority's conclusion to that effect is reasonable and entitled to deference under the doctrine of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respondent argues (Br. 37) that deference is inappropriate because the Authority's approach is inconsistent with the Statute's rule (section 7101(b)) that it be interpreted in a manner consistent with an effective and efficient Government. Respondent's contention is wrong for two reasons. First, the argument is premised on the assumption that midterm bargaining is itself inconsistent with the needs of an efficient government. However, as demonstrated elsewhere (Authority Br. 35-36, and *infra* 14-17), that assumption is unfounded. Second, and as noted in its opening brief, the Authority's position is clearly consistent with the Statute's signal objective of protecting the right of federal employees to organize and bargain collectively (section 7101(a)). Congress left it to the Authority "to reconcile the tensions that will at times exist between [these] twin objectives," and a reviewing court is "bound to defer to the [Authority's] decisions balancing these objectives." *National Treasury Employees Union* v. *FLRA*, 826 F.2d 114, 121 (D.C. Cir. 1987); *see also Railway Labor Executives' Ass'n* v. *ICC*, 930 F.2d 511, 514 (6th Cir. 1991) ("special deference" is due the administrative interpretation of a statute when the interpretation involves reconciling conflicting policies).[7]

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[7]Respondent's suggestion (Br. 37 n.15) that the Authority believes that "'effectiveness and efficiency' should play little role in the development of its midterm bargaining policy" is simply wrong and supported only by a quotation taken out of context. In discussing the second issue in this case, *i.e.* whether midterm

Deference remains appropriate where, as here, an agency reasonably modifies a former position. *See NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). Respondent argues (Br. 38) that deference is unwarranted in this case because the Authority's position "appears to be attributable more to a lower court's adverse ruling than to the agency's own policy choice" (citing *Atchinson, T. & S.F. Ry.* v. *Pena*, 44 F.3d 437, 442-443 (7th Cir. 1994) (en banc), *aff'd on other grounds sub nom. Brotherhood of Locomotive Eng'rs* v. *Atchinson, T. & S.F. Ry.*, 516 U.S. 152 (1996) (*Pena*)). To the contrary, although occasioned by the D.C. Circuit's 1987 decision, the Authority's position on midterm bargaining is its own policy choice. After "carefully review[ing] the previous position of the Authority with respect to union-initiated midterm bargaining," the Authority expressly adopted the decision and rationale of the D.C. Circuit as its own. *Internal Revenue Service*, 29 FLRA 162, 165 (1987).[8] Further, the Authority has continued to adhere to its position for

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bargaining can itself be bargained for, the Authority argued (Authority Br. 40-45) that the negotiability of individual bargaining proposals cannot be measured against an effectiveness and efficiency standard, because to do so would result in the unworkable conclusion that any bargaining proposal that would lessen efficiency would be nonnegotiable. It is incorrect to suggest, as Respondent does, that the Authority has abandoned the general principle that effective and efficient government is a significant factor in the interpretation and application of the Statute.

[8]By contrast, when faced with an adverse ruling from a reviewing court, the Authority has, where it was deemed appropriate, adopted the court's ruling only as the "the law of the case," and declined to accept the court's position as its own. *See Department of the Air Force, Headquarters, Air Force Logistics Command, Wright Patterson Air Force Base, Ohio*, 23 FLRA 376, 379-80 (1986), *pet. for review granted*, 835 F.2d 1458 (D.C. Cir. 1987).

over ten years, even in light of subsequent judicial disapproval.[9]

C. The Authority's Position Is Consistent with the Underlying Policies of the Statute

Respondent relies and expands on arguments found in the Fourth Circuit's *SSA* v. *FLRA* decision to the effect that requiring federal agency employers to bargain midterm will have harmful effects on governmental efficiency, thus undermining the Statute's goal of fostering an effective and efficient government. Essentially, Respondent argues (Br. 22-33) that if midterm bargaining is available to unions, unions will withhold matters during term negotiations in order to bargain matters on a "piecemeal basis," thus creating an inefficient cycle of continuous bargaining over "micro agreements." However, as the Authority demonstrated in its opening brief (pp.35-36), such predictions are devoid of empirical support and based on unfounded assumptions.[10] Specifically, Respondent proffers no evidence that unions have, in fact, used this tactic, nor any persuasive reason why it would necessarily be in a union's interest to do so.

Respondent mistakenly suggests (Br. 24) that because federal sector negotiations do not focus on "core issues"

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[9]*Pena*, cited by Respondent, is wholly inapposite. There the court found that the Federal Railroad Administration's (FRA) statutory interpretation was adopted only in response to an adverse court decision because "the FRA candidly admitted that it did not agree with the [reviewing court's] reasoning." 44 F.3d at 442. Here, the Authority found the court's opinion persuasive and formally adopted it as its own.

[10]As noted above (p. 12, *supra*), Respondent also ignores the Statute's other goal of encouraging collective bargaining.

such as "wages, hours, economic benefits and job security," federal unions have less incentive to secure the benefits of bargaining in a term agreement. Respondent's premise and speculations are unfounded. First, although bargaining over wages is foreclosed for most federal employees, those federal employees whose compensation is not set by statute do bargain over wages. *See, e.g., Fort Stewart Schools*, 495 U.S. at 649-650. Further, even where wages are not negotiable such significant topics as disciplinary procedures,[11] arrangements for employees subject to reductions-in-force,[12] incentive awards,[13] and flexible work hours[14] are the subject of negotiations. Moreover, it is reasonable to assume that it would be in the unions' and their constituents' interests to secure any benefit obtainable through collective bargaining without delay and for the duration of the term agreement.[15]

Second, and citing only the speculation of the Fourth Circuit in *SSA* v. *FLRA*, Respondent asserts (Br. 26) that unions will obtain a "substantive" advantage by "arbitrating a string of unrelated proposals piecemeal rather than in the context of negotiations for a basic agreement." But Respondent produces no authority

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[11]*See NTEU and U.S. Dep't of the Treasury, Customs Serv., Washington, D.C.*, 46 FLRA 696, 704-707 (1992).

[12]*See NAGE, Local R14-87 and Dep't of the Army, Kansas Army National Guard, Topeka, Kansas*, 21 FLRA 380, 383 (1986).

[13]*See NTEU and Internal Revenue Serv.*, 27 FLRA 132, 140 (1987) (adopting *NTEU* v. *FLRA*, 793 F.2d 371 (D.C. Cir. 1986)).

[14]*See AFGE, Local 1934 and Dep't of the Air Force, 3415 ABG, Lowry AFB, Colorado*, 23 FLRA 872, 873-75 (1986).

[15]Respondent also argues that the Statute's grant of official time for union negotiators relieves such negotiators from any incentive to reach a term agreement. Again, Respondent offers no support for suggesting such bad faith on the unions' part.

that such is, in fact, the case.[16] Further, as pointed out in the Authority's opening brief (p. 36), even to the extent unions could obtain bargaining leverage by withholding matters from term bargaining, it is in agency management's power to thwart this strategy by ensuring that term agreements are comprehensive in scope.[17]

Respondent's policy-based arguments are also undercut by its acknowledgment that midterm bargaining is required in response to management-initiated changes in conditions of employment. For example, Respondent contends (Br. 27) that if permitted to bargain midterm, unions could deter agency employers from exercising their statutory prerogative by responding to any management-initiated change with

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[16]Respondent cites continuously to F. Ferris, *Union-Initiated Mid-Term Bargaining; A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407 (Oct. 1989), in support of its policy-based arguments. However, the article is of little help to Respondent. In the first place, the Article is prefaced "In Theory" and as such constitutes nothing more than the author's speculation. Second and more significantly, the thesis of the article is not that unions can or should use midterm bargaining to interfere with government operations, but instead that recognition of the union's right to bargain midterm will lead to broader, more comprehensive term agreements, *id.* at 411, and to negotiations based on shared interests, rather than adversarial legalistic positioning. *Id.* at 416.

[17]Respondent argues (Br. 30) first that "agency employers could not possibly foresee" the variety of issues that might arise during a contractual term and second, even if they could anticipate such matters, management could not "persuade the union" to address them during term negotiations. As for the first point, to the extent that the Respondent is correct, the same lack of prescience would be true for union negotiators, which is, of course, another policy reason supporting midterm bargaining. As for the second, as noted in the Authority's opening brief (p. 36), neither party has the ability to control the breadth of negotiations or refuse to discuss mandatory subjects of bargaining.

multiple midterm proposals. But to the extent such potential exists, it is already present in the union's right to bargain the impact and implementation of those changes, because the union could, if so inclined, respond to any proposed management change with numerous "I and I" proposals.

In sum, Respondent's arguments that midterm bargaining will inevitably lead to governmental inefficiency are based on two unfounded assumptions. The first is that it will be in unions' interest to forego comprehensive term bargaining in favor of "piecemeal" negotiations. The second is that management is incapable of protecting its interests through the bargaining process. As shown above, however, neither of these assumptions is warranted.

II. Even If There Is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Negotiable

A. The Proposal Is Negotiable Because It Is Not Inconsistent with Applicable Law, Rule, or Regulation and Is Within the Agency's Discretion

As the Authority has pointed out (Authority Br. 37-39), in order to establish that a union cannot acquire the right to bargain midterm through the collective bargaining process, Respondent must not only show that the Statute does not require midterm bargaining, but that it *prohibits* it. As the Authority further demonstrated (Authority Br. 40-47), midterm bargaining, even if not required, is not inconsistent with the Statute. Respondent points to no provision of law or

government-wide regulation prohibiting midterm bargaining.[18]

Respondent also suggests that the midterm bargaining proposal does not concern a condition of employment (Br. 41), claiming that it falls within the exception found in section 7103(a)(14)(C) for matters "specifically provided for by Federal statute."[19] To fall within this exception: (1) the matter must be addressed in the statute "with exactness and precision"; and (2) the statutory provision must leave the agency with no discretion concerning the matter. *See International Ass'n of Machinists and Aerospace Workers, Franklin Lodge No. 2135, et al. and U.S. Dep't of the Treasury, Bureau of Engraving and Printing*, 50 FLRA 677, 681-685 (1995), *enforced*, 88 F.3d 1279 (D.C. Cir. 1996).[20] As

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[18]Respondent incorrectly cites (Br. 43) to *Overseas Education Association* v. *FLRA*, 827 F.2d 814, 818 (D.C. Cir. 1987) (OEA) as support for its position that there is no obligation to bargain over the union's midterm bargaining proposal. The passage selectively quoted from *OEA* stands only for the unremarkable proposition that if a proposal contains matters that an agency cannot lawfully agree to, then the proposal is nonnegotiable.

[19]Respondent failed to argue that the proposal did not concern a condition of employment either to the Authority or to the court of appeals, nor was this the basis for any of the decisions of the Fourth Circuit. Section 7123(c) of the Statute prohibits a party from raising before a reviewing court any matter not urged before the Authority. *See EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986).

[20]Respondent also suggests (Br. 46 n.21) that the proposal does not concern a condition of employment because it concerns "the structure of bargaining" rather than a "substantive" condition of employment, but cites to no case where bargaining rules or procedures are found not to concern conditions of employment. To the contrary, it is well established that such matters are considered as such. *See General Electric Co.*, 173 NLRB 253, 257 (1968), *enforced*, 412 F.2d 512 (2d Cir. 1969) (the time, place, or agenda of bargaining sessions "are just as much part of the process of collective bargaining as the negotiation over wages, hours, etc.").

noted above (p. 22, *supra*), however, the Statute does not expressly address the obligation to bargain midterm. Accordingly, Respondent cannot distinguish *Bureau of Alcohol, Tobacco, and Firearms* v. *FLRA*, 464 U.S. 89, (1983), wherein this Court recognized that unions may negotiate to obtain rights in excess of those provided in the Statute.

In addition, Respondent acknowledges (Br. 45) that agencies have discretion to bargain midterm. In that regard, Respondent fails to rebut the well established principle that where agencies have discretion, they are obligated to bargain to the extent of that discretion. *See* Authority Br. 45-46. The Respondent's purported distinction (Br. 45) between engaging in discretionary acts and binding oneself in advance to exercise that discretion is of no significance in this context. Many provisions in collective bargaining agreements constitute some advance commitment to exercise discretion in a particular manner.

B. The Authority's Negotiability Determination Is Not an Attempt to Impose Midterm Bargaining on Agency Employers

The negotiability of a midterm bargaining proposal is only an issue if the Court finds that there is no statutory obligation to bargain midterm. Should the court so find, many of the concerns of Respondent evaporate. First, in finding a proposal negotiable, the Authority has consistently emphasized that it makes no judgment as to its merits, leaving it to the parties to determine through the bargaining process whether to adopt it. *See Department of Defense*, 659 F.2d at 1147. The Authority has no interest in "subvert[ing] Congress's view" (Respondent's Br. 46) or "usher[ing] in through the back

door, the very midterm bargaining regime Congress . . . rejected" (Respondent's Br. 39-40).

Second, and contrary to Respondent's suggestion (Br. 40 and n.16), it is not the case that the Impasses Panel will automatically impose midterm bargaining proposals if the Court determines that such bargaining is not mandated by the Statute. *See* Authority Br. 43-44. Rather, the Impasses Panel, an entity composed of seven presidential appointees required by section 7119(b)(2) of the Statute to be "familiar with Government operations and knowledgeable in labor management relations," imposes only proposals it considers reasonable. *Veterans Admin. Med. Ctr., Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). The Impasses Panel can be expected to weigh the respective interests of the parties, including the impact of proposals on governmental efficiency. *See, e.g., U.S. International Trade Commission, Washington, D.C. and Local 2211, American Federation of Government Employees, AFL-CIO*, Case No. 98 FSIP 18, Decision and Order at 4 (Apr. 7, 1998) (ordering union to withdraw its proposal because union's concerns are "outweighed by the disruptive impact the adoption of the proposal would have on the Employer's ability to manage its operations efficiently").

Respectfully submitted,

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

* Counsel of Record

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